IN THE HIGH COURT OF JUDICATURE FOR

RAJASTHAN AT JODHPUR

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O R D E R

Smt. Indira Devi
Vs.
State of Rajasthan & Anr.

S.B. CIVIL WRIT PETITION NO.2462/2002
UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER :: 05th October , 2006

PRESENT

HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

Mr. R.S. Saluja, Advocate for the petitioner.
Mr. Rameshwar Dave, Dy. Govt. Advocate.

REPORTABLE

BY THE COURT

Under challenge in this petition is the order dated 04th March, 1991 whereby the petitioner's husband was dismissed

from service. It has been prayed that the said order be quashed and set aside and consequently directions may be issued to the respondents to consider her case for appointment on compassionate ground and the respondents be further directed to grant family pension to the petitioner in accordance with the proviso to Rule 268B of the Rajasthan Service Rules.

Facts in brief as unfolded in the writ petition are that the petitioner's husband was appointed in the service of respondents as LDC vide order dated 04th September, 1979 on temporary basis and he was subsequently made permanent by order dated 19th June, 1981. The petitioner's husband was some time in the year 1985 transferred from the office of District Collector, Pali to the office of District Collector, Jodhpur. In the aforesaid manner the petitioner's husband continued to serve the respondents till 1988. It has been stated that the petitioner's husband left his office on 06th February, 1988. He thereafter never returned back home. Nothing was heard about him by the petitioner or any one of her family members nor were his whereabouts known. It has been asserted that on

account of illiteracy and the things having happened so fast, the petitioner did not retain copy of application submitted by her to the respondents. It has been stated that on efforts being made by colleagues of the petitioner's husband, the District Collector, Jodhpur started paying to petitioner an ex gratia payment of Rs.100/- per month which continued for about five months. The petitioner submitted an application in the year 1990 requesting that she be given appointment on compassionate ground in place of her husband whose whereabouts were not known. The application was however rejected by order dated 14th September, 1990. When the petitioner prayed for family pension, the District Collector, Jodhpur by order dated 31st July, 1995 required her to submit copy of the First Information Report lodged regarding missing of her husband. The petitioner however stated that refusal by the respondents for family pension was contrary to proviso of Rule 268B of the Rajasthan Service Rules which is reproduced as under:-

> "Provided further that if a Government servant is unheard of for more than a period of one year the

> family pension at the rate prescribed under Rule 268 C shall be sanctioned and authorized to the member of his/her family as defined under Rule 268D on submission of an application alongwith Indemnity Bond and Affidavit in the prescribed form and also a copy of F.I.R. lodged with the Police about the dis-appearance of the Government servant. If in any case, the Government servant subsequently re-appears the family pension shall immediately cease to be admissible and payable. The amount of family pension already paid to the family, shall be recoverable from the salary of the Government servant."

The respondents for the first time informed the petitioner by letter dated 18th June, 1996 that her husband has already been dismissed from service by order dated 04th March, 1991. The petitioner was conveyed by letter dated 23rd April, 2001 that no relief could be granted to her because her husband has already been dismissed from service. On completion of seven years from the date of missing her husband, the petitioner submitted a complaint on 09th September, 1995 to S.H.O. Plice Station, Pratapnagar, Jodhpur. Even then no relief was granted by the respondents to the petitioner. In these circumstances, she has filed the present writ petition.

The respondents have contested the matter and filed the

reply to the writ petition. In the reply, it has been asserted that the present petition suffers from delay and latches. Husband of the petitioner was missing from 06th February, 1988 and she was refused family pension vide order dated 18th September, 1996 because her husband had been dismissed from service vide order dated 04th March, 1991. Inspite of this, the petitioner has filed the writ petition enormously delayed in the year 2002. On merits, it has been submitted that even though the husband of the petitioner was said to be missing from 06th February, 1988 but no report thereof was lodged for about seven years. The respondents have pleaded that it is "absolutely unbelievable that the husband of the petitioner is missing since 06.02.88." The respondents however averred nothing about the merits of the case n their reply.

I have heard Mr.R.S. Saluja, learned counsel for the petitioner as well as Mr.Rameshwar Dave, learned Dy. Government Advocate and perused the record.

Learned counsel for the petitioner has placed reliance on

a judgment of this Court in State of Rajasthan & Ors. vs. Phooli Devi & Ors., reported in 2003 (1) WLC (Raj.) 479 and further in the case of Smt. Shakuntala Kanwar vs. Union of India & Ors., reported in 2002 (4) WLC (Raj.) 315 and a Single Bench judgment of this Court in Kaushlendra Singh Naruka vs. The State of Rajasthan & Anr., reported in 2000 (1) WLC (Raj.) 723.

Learned counsel for the petitioner has further argued that the petitioner being illiterate could not earlier approach this Court inasmuch as she had been regularly representing to the respondents for redressal of her grievances. The respondents however on technical grounds refused to either sanction family pension to her or consider her case for appointment on compassionate ground. The disciplinary proceedings against husband of the petitioner were conducted ex parte and no notice of those proceedings was served either on the petitioner or any of her legal heirs. Such proceedings conducted in utter disregard of the principles of natural justice were void in law and consequently the order of dismissal passed on the basis of such proceedings was also illegal.

On the other hand, learned Dy. Government Advocate argued that the husband of the petitioner remained willfully absent for a very long time and therefore after holding disciplinary proceedings, he was dismissed from services. He argued that petitioner did not take any steps to lodge the First Information Report about missing of her husband for seven years. The writ petition has also been filed erroneously delayed. In the circumstances, the writ petition is therefore liable to be dismissed.

The issues raised in this writ petition in so far as the proposition of law on the controversy involved is concerned, are no longer res interga. A Division Bench of this Court in Phooli Devi (supra) authoritatively held in somewhat similar circumstances as under:-

> **"12** Rather action of the appellant State in initiating inquiry proceedings after seven years of disappearance of the Government servant and further holding such inquiry proceedings without service of pre and/or post initiation of proceedings in order to culminate into order of

punishment of removal, both are against the constitutional mandate and principle of natural justice. That being so, the learned Single Judge has rightly condemned the action of the appellant State by holding that termination of a Government servant who has not been traced out or not heard of at all or his whereabouts were not known for more than seven years, is no meaning, inasmuch as no charge sheet could be issued to a dead person who by virtue of S. 108 of the Evidence Act is presumed to have died.

13. Once the decks are clear that admittedly Nanagram Meena was not heard of at all for more than seven years from the date of his disappearance of missing (3.4.1986), in support of which there is an uncontroverted pleadings of the writ petitions duly supported by an affidavit to the effect that she has not heard of her husband (Nanagram Meena) since 3.4.86 and for last more than seven years, a presumption would must arise in her favour by virtue of Section 108 of the Evidence Act that her husband has been dead. Thus viewed, the appellant State therefore have to grant relief to the writ petitioners on the presumption that her husband is dead and she is a widow of deceased government servant entitling to grant of relief as sought for in their writ petition. Having scanned the impugned judgment of the learned Single Judge assailed before us, we find no infirmity whatsoever in the said judgment and the learned Single Judge was justified in allowing the writ petition and in granting relief in favour of the writ petitioners as detailed above, which does not warrant any interference by this Court. In the said view of the matter, this appeal is dismissed. No

Costs."

Another Division Bench judgment of this Court in Smt. Shakunala Kanwar (supra) also on the same issue held in para 11 and 12 as under:-

> **"11.** By reading this relevant clause 3 of the memorandum, it is clear that a report should be lodged with the concerned Police Station about missing of the personnel and this fact should also come on record that employee have not been traced despite all efforts having been made by the police. In the present matter, both conditions are satisfied. Report has been lodged in police by Commandant 27th battalion BSF himself about missing of Sayar Singh and this fact is also established that Sayar Singh has not been traced despited all efforts having been made by the police, so we are of the considered view that the case is fully covered by the Government Decision O.M. No.1/17/86 P & PW dated 29th August, 1986 and the petitioner appellant is entitled for all benefits which are available to the family of Sayar Singh according to above Government Decision. In the writ petition filed by the appellant-petitioner it has been stated that her husband had been wrongly dismissed from service from 9.6.83, she has also mentioned that no such copy of order regarding dismissal of service of petitioner' husband was received by the petitioner and entire action of respondents is mere cover up of their mistake. On the other hand, learned counsel

for the respondents have also not placed on record copy of any such order of dismissal. The circumstances of this case and facts established by the petitioner clearly shows that it is not a case of desertion by constable Sayar Singh but it is a case of missing of a personnel and therefore if any such order has been passed about dismissal of Sayar Singh that is absolutely bad in the eye of law. We are also of the view that it is a case of missing of Sayar Singh and therefore case of the petitioner should be treated as her husband Sayar Singh is missing and his whereabouts are not known since 1983 and under these circumstances provisions given in above mentioned memorandum are fully applicable in present matter. We are also of the view that if any dismissal order has been passed by concerned Commandant of any Official, such order is absolutely illegal and deserves to be set aside which we hereby do. We are also of the view that this appeal should be accepted and judgment of the learned Single Judge should be set aside and the writ petition should also be accepted.

12. Consequently, we allow this special appeal filed by the petitioner-appellant Shakuntala and set aside the judgment dated 10.07.1995 passed by the learned Single Judge. The husband of the appellant Smt. Shakuntala is missing since 1983, he could not be traced despite all efforts having been made by the Police and her case is fully covered by the Government Decision O.M. No.1/17/86-P & PW, dated the 29th August, 1986, D.P. & P.W. On 25.1.1991 and Memorandum the Government of India, Ministry of Personnel PG & Pension dated 18.2.1993, therefore respondents Nos 1 to 4

> are directed to consider the case of appellant-Smt. Shakuntala in accordance with the Government Decision O.M. No.1/17/86-P & PW, dated the 29th August, 1986, and grant all the benefits which are available to petitioner according to the above mentioned Government order with all consequential benefits. Costs made easy."

The Single Bench judgment cited by learned counsel for the petitioner is also on the similar controversy where the petitioner's father was missing for last seven years and was deemed to be dead. In those circumstances, the respondents were directed to consider the case of the petitioner for compassionate appointment and give him appointment in accordance with law.

A bear look at the order dated 04th March, 1991 make it clear that the petitioner's husband was dismissed from service on the charge of being willfully absent from 06th February, 1988. Although a notice was published in the newspaper on 05th November, 2000 but no one appeared and the proceedings were thus conducted ex parte and finally culminated into dismissal of petitioner's husband. The petitioner being illiterate

could not timely lodged the First Information Report about her missing husband. But that was no reason not to grant family pension to her. In fact, the petitioner has stated that the District Collector, Jodhpur efforts being made by colleagues of her husband started making payment of ex gratia amount to her which payment was continued for about five months but ultimately discontinued. This fact as asserted by the petitioner in para 5 of the writ petition has not been denied by the respondents in their reply. Although presumption about the death of missing person can according to Section 108 of the Indian Evidence Act be raised only upon expiry of period of seven years. But Rule 268B of R.S.R. as quoted above make it clear that the grant of family pension would not await the expiry of period of seven years. If it is proved that a government servant is missing for more than a period of one years as prescribed under Rule 268-C, payment of family pension shall be sanctioned and authorized to member of family of missing government servant as defined under Rule 268C on submission of application alongwith affidavit in prescribed form and also a copy of FIR lodged in the Police

Station.

When the respondents made payment of ex gratia amount to the petitioner for about five months, all these formalities could have been completed within that period. There is no justification of the fact that respondents should have required the petitioner to repeatedly represent and to ultimately inform her belatedly on 31st July, 1995 to that she should submit copy of FIR about missing of her husband for taking further action. It is all the more surprising that when the petitioner submitted the application along with such report on 10th June, 1996, she was informed by the District Collector that since petitioner's husband was dismissed from service, the payment of family pension was not admissible to her. A perusal of the order of dismissal dated 04th March, 1991 would evidently make it clear that although a charge sheet was issued to the husband of the petitioner under Rule 16 of the Rajasthan Civil Services (CCA) Rules, 1958 on 10th May, 1988 for willful absence from 06th February, 1988 but it service was not made/could not be made because of his non-availability in his

house at Jodhpur and also because he could not be traced at his permanent address in Pali. It was therefore that the notice dated 10th October, 1988 was published in Rajasthan Patrika in its issue dated 05th November, 1988 and thereafter again on 03rd June, 1989 and finally the matter proceeded ex parte against the husband of the petitioner. According to the order of penalty dated 04th March, 1991, petitioner's husband was found guilty of willful absence and charge of such absence having been found proved against him, he was dismissed form service w.e.f. 06th February, 1988.

Division Bench of this Court in Phooli Devi (supra) was dealing with the case wherein also husband of the petitioner Nanagram Meena absented from his duties w.e.f. 03rd April, 1986 and did not report back despite publication of notice in newspaper on 11th October, 1987 and 22nd March, 1988. Finally a charge sheet was issued to him on 28th May, 1993 followed by an order of his removal from service on 23rd April, 2001. The Division Bench held that whatever the pre and/or post inquiry proceedings initiated against Nanagram, were totally against

the constitutional mandate so also principles of natural justice. None of the communications issued prior to or after initiation of inquiry upon charge sheet dated 28.5.93 were got served upon him as they all returned back duly unserved as is established from the statements of memo of the chargesheet itself or published notices obviously because Nanagram has been missing; his whereabouts were neither known nor heard of for seven years from 3.4.86 the date of disappearance of Nanagram. Thus observing, the Division Bench upheld the view taken by the learned Single Judge wherein action of the respondents was condemned as illegal and unconstitutional.

In the present case also, the observations made by the Division Bench squarely applies to the facts of the present case. There is however one additional factum that need to be noticed that when husband of the petitioner was absent from 06th February, 1988, chargesheet was issued to him on 10th May, 1988. In this case however the order of dismissal from service has been made effective from 06th February, 1988, a day even prior to the issuance of the chargesheet. When husband of the

petitioner not having been heard about for more than seven years is presumed dead, entire disciplinary proceedings conducted against him stood vitiated and were rendered illegal. His dismissal from service having been made contrary to provisions of C.C.A. Rules and in utter disregard of principles of natural justice was therefore void, nonest and illegal.

There was no justification for the respondents not to have made the payment of family pension to the petitioner on expiry of period of one year from the date her husband disappeared with effect from 06th February, 1988 particularly when they had started making payment of ex gratia amount to her which was continued for five months. The respondents were obliged in law to timely inform the petitioner as to what formalities she was required to fulfill which they ultimately inform her as delayed as on 31st July, 1995 when they asked her to lodge the First Information Report. But then within a year on 18th June, 1996, they informed her that she was not entitled to receive family pension because her husband was dismissed from service.

Since a period of eighteen long years has now passed since the late husband of the petitioner disappeared and she has now been held entitled to family pension. I do not deem it appropriate to direct the respondents to consider her case at this stage for grant of compassionate appointment.

In the result, the writ petition is partly allowed. The order dated 04th March, 1991 and the order dated 18th June, 1996 are quashed and set aside. On expiry of period of seven years from 06th February, 1988 a presumption should arise with regard to the death of the petitioner's husband w.e.f. 06th February, 1995. The petitioner is however declared entitled to receive family pension w.e.f. 06th February, 1989, after expiry of period of one year from the date her husband was last heard of, in accordance with the proviso to Rule 268B of R.S.R. Consequent upon declaration of dismissal order of petitioner's husband as illegal, the respondents are directed to grant all terminal benefits to the petitioner treating her to be a widow of deceased government servant though taking 06th February, 1988 as the basis for calculating terminal benefits and make

payment of all terminal benefits and arrears of family pension together with interest @ 6% per annum within a period of three months from the date of service of copy of this order.

The writ petition is partly allowed in terms of the directions as aforesaid with no order as to costs.

[MOHAMMAD RAFIQ],J.

A.K. Chouhan/-